LING HOCK LING A

v.

TAI LIAN LAND DEVELOPMENT CO

COURT OF APPEAL, PUTRAJAYA B
GOPAL SRI RAM JCA
AHMAD FAIRUZ JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: C-02-409-1995]
29 JUNE 2006 C

CONTRACT: *Construction - Employment - Whether defendant employed as subcontractor of plaintiff - Evidence of plaintiff - Payments from plaintiff to defendant - Proof of debt - Evidence Act 1950, s. 34*

EVIDENCE: *Documentary evidence - Books of accounts - Admissibility of entries in plaintiff's ledger - Other relevant evidence - Whether ought to be taken into account - Evidence Act 1950, s. 34* D

EVIDENCE: *Appeal - Interfering with finding of fact - Role of appellate court - Whether must defer to findings of fact based on credibility of witnesses seen and heard by trial judge - Whether there was misdirection by trial judge on appreciation of facts* E

The two issues in this appeal were, firstly, whether the defendant was the plaintiff's subcontractor, and secondly, whether the F plaintiff had proved on a balance of probabilities that it had sold and delivered goods and rendered financial assistance to the defendant. The learned trial judge decided for the plaintiff on both issues and the defendant appealed to this court. The plaintiff had entered into a contract with the Federal Land Development G Authority ('FELDA') to carry out weeding and fertilising work. According to letters exchanged between the plaintiff and FELDA, the defendant was described as a subcontractor; these letters were copied to the defendant. From time to time, the defendant drew monies from the plaintiff as evidenced by certain vouchers, some H of which were signed by the defendant himself. Additionally, there were entries in the plaintiff's ledger which confirmed payments made to the defendant. The plaintiff led oral evidence at the trial to show the relationship of subcontractor, of the payments made to the defendant and the reason for those payments *ie*, to provide I financial assistance to the defendant to enable him to perform his

A subcontract. The defendant's case was that he was never the subcontractor and he kept to that story when he gave evidence.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA:

B **(1)** The defendant, upon receiving copies of the plaintiff's letters to FELDA, did not protest about his description as a subcontractor. If it was not the truth, he should have said so. Instead, he kept quiet and in such circumstances, it did not lie in his mouth to say that he was not the plaintiff's C subcontractor. Therefore, the defendant's complaint in respect of the first issue was without merit. (para 3)

(2) As for the proof of debt, the learned judge was correct in taking into account the entries in the plaintiff's ledger together D with the other evidence when making his findings. These entries were clearly admissible under s. 34 of the Evidence Act 1950, and although mere entries in books of accounts were not by themselves sufficient to charge any person with liability, this was a case in which there was other evidence which the E learned judge accepted as credible. Thus, the ledger entries became relevant, admissible and were very properly taken into account by the learned judge. It followed that there was really nothing in the second issue raised by the defendant. (paras 4, 5, 6 & 7)

F **(3)** This was a case in which the learned judge, based on the totality of the evidence before him, had accepted the plaintiff's version of the events and rejected the defendant's. He was plainly entitled to do so for it was within his province as the G primary trier of fact to prefer, for good reasons, the plaintiff's version to that of the defendant, and he did give good reasons for preferring the plaintiff's story. In this state of affairs, an appellate court must defer to the findings of fact based on the credibility of witnesses seen and heard by the learned trial H judge, and more so as there was no misdirection by the learned judge on his appreciation of the facts. Accordingly, it was unnecessary to call upon the plaintiff's counsel for a reply. (paras 8, 9 & 10)

I

Bahasa Malaysia *translation of headnotes*

Dua isu yang berbangkit di dalam rayuan di sini adalah, pertama, sama ada defendan adalah subkontraktor plaintif, dan kedua, sama ada plaintif telah membuktikan atas imbangan kebarangkalian bahawa ia telah menjual dan menyerahkan barangan kepada defendan dan memberi bantuan kewangan kepada pihak terkemudian tersebut. Yang arif hakim bicara memutuskan kedua-dua isu dengan berpihak kepada plaintif dan defendan merayu ke mahkamah ini. Plaintif memeterai perjanjian dengan Lembaga Kemajuan Tanah Persekutuan ('FELDA') untuk menjalankan kerja-kerja membersih dan membaja ladang. Dalam surat-menyurat antara plaintif dan FELDA, defendan disebut sebagai subkontraktor dan salinan surat-surat ini telah dihantar kepada defendan. Dari masa ke masa defendan juga telah mengeluarkan wang dari plaintif, seperti yang ternyata dari beberapa baucer yang sebahagiannya ditandatangani oleh defendan sendiri. Selain itu, terdapat butiran-butiran di dalam lejer plaintif yang mengesahkan bayaran kepada defendan. Di perbicaraan, plaintiff memberi keterangan mengenai perhubungan subkontraktor dan bayaran yang dibuat kepada defendan, serta sebab-sebab kenapa bayaran dibuat, iaitu, untuk memberi bantuan kewangan kepada defendan bagi membolehkannya melaksanakan subkontrak. Kes defendan adalah bahawa beliau bukan seorang subkontraktor dan bertegas dengan pendirian itu sepanjang keterangannya.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR:

(1) Sebaik menerima salinan-salinan surat plaintif kepada FELDA, defendan tidak memprotes mengenai pemerihalan dirinya sebagai subkontraktor. Sekiranya itu tidak benar beliau harus menyatakannya. Sebaliknya, beliau hanya berdiam diri dan dalam keadaan sedemikian, adalah tidak terbuka baginya untuk berkata bahawa beliau bukan subkontraktor plaintif. Oleh itu, bantahan defendan atas isu pertama tidak bermerit.

(2) Berkaitan bukti hutang, yang arif hakim betul apabila memberi pertimbangan kepada butiran di dalam lejer plaintif bersama-sama dengan keterangan-keterangan lain dalam mencapai dapatannya. Butiran-butiran ini jelas boleh diterima-masuk di bawah s. 34 Akta Keterangan 1950, dan walaupun butiran yang dimasukkan di dalam buku akaun semata-mata tidak mencukupi untuk membangkitkan liabiliti terhadap seseorang,

dalam kes ini terdapat keterangan-keterangan lain yang telah diterima sebagai boleh dipercayai oleh yang arif hakim. Oleh itu, butiran di dalam lejer adalah relevan dan telah dipertimbang dengan teraturnya oleh yang arif hakim. Ianya mengikut bahawa tiada apa pun di dalam isu kedua yang dibangkitkan oleh defendan.

(3) Ini adalah kes di mana yang arif hakim, berdasarkan keseluruhan keterangan di hadapannya, telah menerima versi plaintif mengenai peristiwa dan menolak versi defendan. Yang arif hakim berhak berbuat demikian kerana sebagai pengadil utama fakta beliau boleh memilih versi mana yang diterimanya atas alasan-alasan kukuh, dan beliau sememangnya telah memberikan alasan-alasan kukuh bagi pemilihannya di sini. Dalam halkeadaan yang wujud, mahkamah rayuan harus akur kepada dapatan fakta yang dibuat berdasarkan kebolehpercayaan saksi-saksi yang dilihat dan didengar oleh yang arif hakim bicara, lebih-lebih lagi memandangkan tidak berlaku salah arahan oleh yang arif hakim dalam penilaian faktanya. Oleh itu, adalah tidak perlu untuk memanggil peguam plaintif untuk memberikan jawapan balasnya.

Case(s) referred to:

Beni v. Bisan Dayal Anor AIR [1925] Nag 445 ***(refd)***

Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***

Ryan v. Jarvis [2005] UKPC 27 ***(refd)***

State of Andhra Pradesh v. Cheemalapati Ganeswara Rao AIR [1963] SC 1850 ***(refd)***

Wong Hon Leong David v. Noorazman Adnan [1995] 4 CLJ 155 CA ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 34

For the appellant/defendant - Jacob Goldie; M/s Balendran Chong & Bodi
For the respondent/respondent - Mura Raju; M/s Mura Raju & Co

[Appeal from High Court, Kuantan; Civil Suit No: 58-1984]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] There are two issues in this appeal. First, whether the defendant was the plaintiff's subcontractor; second, whether the plaintiff had proved on a balance of probabilities that it had sold and delivered goods and rendered financial assistance to the defendant. The learned trial judge decided for the plaintiff on both issues and the defendant appealed to us. The brief facts relevant to this appeal are as follows.

[2] The plaintiff entered into a contract with the Federal Land Development Authority (FELDA) to carry out weeding and fertilising work in schemes 2 and 3 in Cini Timur Tiga. According to the letters exchanged between the plaintiff and FELDA the defendant was described as subcontractor. These letters were copied to the defendant. From time to time, the defendant drew monies from the plaintiff as evidenced by the vouchers some of which were signed by the defendant himself. Additionally, there are entries in the plaintiff's ledger which confirm payments made to the defendant. The plaintiff led oral evidence at the trial to show the relationship of subcontractor, of the payments made to the defendant and the reason for those payments. That reason was to provide financial assistance to the defendant to enable him to perform his subcontract. The defendant's case was that he was never the subcontractor and he kept to that story when he gave evidence. It is however clear from a reading of the notes of evidence taken by the learned judge that the defendant found himself in great difficulty when confronted with the correspondence, a fact mentioned by the judge in his judgment.

[3] With these facts in hand we turn to consider the first issue. Now, here we have a case where the defendant upon receiving copies of the plaintiff's letters to FELDA did not make any protest about his description as a subcontractor. If it was not the truth he should have said so. But he kept quiet. In these circumstances it does not lie in his mouth to say that he was not the plaintiff's subcontractor. See, *Wong Hon Leong David v. Noorazman bin Adnan* [1995] 4 CLJ 155. The defendant's complaint in respect of the first issue is therefore without merit.

[4] As for the proof of the debt, the entries in the plaintiff's ledger, these were taken into account by the learned judge together with the other evidence when making his findings. In our judgment he was correct in the approach he took. Those entries were clearly admissible under s. 34 of the Evidence Act 1950 which provides as follows:

> Entries in books of accounts regularly kept in the course of business are relevant whenever they refer to a matter into which the court has to inquire, but the entries shall not alone be sufficient evidence to charge any person with liability.

[5] In *State of Andhra Pradesh v. Cheemalapati Ganeswara Rao*, AIR [1963] SC 1850 the Indian Supreme Court explained the way in which the section is to be applied:

> What it does is to make entries in books of account regularly kept in the course of business relevant in all proceedings in a court of law. These entries are, however, not by themselves sufficient to charge any person with liability. Therefore, when A sues B for a sum on money it is open to him to put his account books in evidence provided they are regularly kept in the course of business and show by reference to them that the amount claimed by him is debited against B. The entry though made by A in his own account books, and though it is in his own favour is a piece of evidence which the court may take into consideration for the purpose of determining whether the amount referred to therein was in fact paid by A to B. The entry by itself is of no help to A in his claim against B but it can be considered by the Court along with evidence of A for drawing the conclusion that the amount was paid by A to B. To this limited extent entries in the account books are relevant and can be proved. Section 34 does not go beyond that.

[6] Of course, if there is no evidence apart from the regularly kept books of account, a litigant cannot rely solely upon the entries in his ledger to prove his case against his opponent. And that is what happened in *Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 where Edgar Joseph Jr J (as he then was) applied the following passage in the judgment of Wadegaonkar J in *Beni v. Bisan Dayal Anor* AIR [1925] Nag 445 at p 446:

> Mere entries in books of account are not by themselves sufficient to charge any person with liability (*vide* s. 34 of the Evidence Act). The reason is that a man cannot be allowed to make evidence for himself by what he chooses to write in his own books behind the back of third parties. There must be independent evidence of the transaction to which the entries relate and as no such evidence has been adduced in this case the court below was wrong in holding that defendant no I had paid the money to plaintiff for payment of the kist for January 1921 ...

[7] But, as we have already pointed out, this is a case in which there was other evidence which the learned judge accepted as credible. So the ledger entries became relevant, admissible and were very properly taken into account by the learned judge. It follows that there is really nothing in the second issue raised by the defendant.

[8] This is a case in which based on the totality of the evidence before him the learned judge accepted the plaintiff's version about the events and rejected the defendant's. He was plainly entitled to do so for it was within his province as the primary trier of fact to prefer, for good reasons, the plaintiff's version to that of the defendant. We must say at once that the learned judge in this case gave good reasons for preferring the plaintiff's story.

[9] In this state of affairs, we, as an appellate court must defer to the findings of fact based on the credibility of witnesses seen and heard by the learned trial judge. As stated by Lord Hoffmann in *Ryan v. Jarvis* [2005] UKPC 27 when delivering the advice of the Board in an appeal from Antigua & Barbuda:

> It is of course most unusual for an appellate tribunal to reverse a trial judge's findings on credibility on the ground that the evidence which he rejected has the ring of truth. The true or false note is generally more audible to the judge who hears and sees the witnesses than to the appellate court reading the record.

[10] That we believe is precisely the case here. More so, because we find no misdirection by the learned judge on his appreciation of the facts. Accordingly we found it unnecessary to call upon the plaintiff's counsel for a reply.

[11] For the reasons already given, this appeal was dismissed and those orders made that are usually consequent upon an unsuccessful appeal.

[12] My learned brothers Ahmad Fairuz and Mokhtar bin Haji Sidin, JJCA have seen this judgment in draft and have expressed their agreement with it.